THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0688, Whitman Real Estate Holding Co., LLC (d/b/a Camp Walt Whitman) v. Town of Piermont; Whitman Real Estate Holding Co., LLC (d/b/a Camp Walt Whitman) v. Town of Piermont; Wendy Cahill & a. v. Town of Piermont, the court on September 10, 2007, issued the following order:

The intervenors, Wendy Cahill et al., appeal an order of the superior court on remand from this court vacating two decisions of the Town of Piermont Zoning Board of Adjustment (ZBA). In the first decision, the ZBA found that the petitioner, Whitman Real Estate Holding Co., LLC d/b/a Camp Walt Whitman (the Camp), exceeded the scope of its nonconforming use. In the second decision, the ZBA granted the petitioner a special exception subject to certain conditions. We reverse and remand.

This case is before the court for a second time. In the first appeal, we vacated the trial court's order and remanded with instructions for the court to review whether the Camp exceeded the scope of its nonconforming use without considering certain band and dance activities. In our remand order, we explained that the trial court had erred when it considered these activities because, by the time the trial court heard the case, these activities were no longer at issue. By that time, the Camp had agreed to stop them. Thus, we explained, the trial court erred by considering them.

On remand, the trial court ruled that the ZBA erred when it found that the Camp had impermissibly expanded its nonconforming use. Specifically, the trial court found that the increased enrollment of campers, alone, did not have a substantially different effect on the neighborhood, and thus, the petitioner's intensification of its nonconforming use was permissible. See Pope v. Little Boar's Head Dist., 145 N.H. 531, 535-36 (2000) (property owner who seeks to expand or intensify a nonconforming use internally may do so as a matter of right if such intensification will not result in a substantial change to the use's effect on the neighborhood).

"In reviewing the trial court's order, we uphold the decision of the superior court unless it is not supported by the evidence or is legally erroneous." Peabody v. Town of Windham, 142 N.H. 488, 492 (1992) (quotation and brackets omitted). "For its part, the trial court, in reviewing the decision of a zoning board of adjustment, is limited to a determination of whether, on the balance of the probabilities, the decision was unlawful or unreasonable." Id. (quotation omitted); see RSA 677:6 (1996). Findings of a

zoning board of adjustment, upon all questions of fact properly before it, are deemed prima facie lawful and reasonable. See RSA 677:6.

Nonconforming uses relate to conditions that exist before a zoning ordinance is passed. Town of Salem v. Wickson, 146 N.H. 328, 330 (2001). A nonconforming use is a lawful use existing on the land at the time an ordinance prohibiting that use is adopted. Id. Because the general policy of zoning law is to limit carefully the extension and enlargement of nonconforming uses, we strictly construe provisions that permit the continuance of such uses, and the party asserting that a proposed use is not new or impermissible bears the burden of proof. Id. Accordingly, an extension and enlargement that substantially changes the nature and purpose of the nonconforming use is impermissible. Id.

Whether a proposed use would be a substantial change in the nature or purpose of a preexisting nonconforming use turns on the facts and circumstances of each case. Hurley v. Town of Hollis, 143 N.H. 567, 571 (1999). In conducting this inquiry, we consider: (1) the extent the use in question reflects the nature and purpose of the prevailing nonconforming use; (2) whether the use at issue is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and (3) whether the use will have a substantially different effect on the neighborhood. Id. at 571-72. Further, a nonconforming use cannot be substantially enlarged or expanded; it may be expanded only where the expansion is a natural activity, closely related to the manner in which the property was used when the ordinance creating the nonconforming use was enacted. Id. at 572.

On appeal, the intervenors argue that the trial court erred when it ruled, in effect, that because "the Camp's use of the property has remained fundamentally the same for decades," the effect of the Camp's use of the property on the neighborhood must also have been the same. As the trial court explained, "Absent the after-camp activities, which undoubtedly would have had a substantially *different* effect on the neighborhood, this Court cannot find that the increased enrollment, by itself, had a substantially different effect on the neighborhood." To the extent that the trial court ruled that the Camp's increased enrollment could not, as a matter of law, have a substantially different effect on the neighborhood, it erred. By so ruling, the trial court improperly combined prongs two and three of the test for determining whether a nonconforming use has been impermissibly expanded. See id. at 571-72.

We therefore reverse the trial court's order and remand for further proceedings consistent with this order. Because it appears that the ZBA has not yet had the opportunity to determine whether the Camp impermissibly expanded its nonconforming use, without considering the dance and band activities, and because any factual findings the ZBA may make about that issue will be entitled to deference, see RSA 677:6, we clarify that upon remand, the superior court

should remand the matter to the ZBA to determine whether the Camp impermissibly expanded its nonconforming use. The ZBA may, in its discretion, hold such further proceedings as it deems necessary.

Reversed and remanded.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk